IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1249 of 1986

For Approval and Signature:

HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

PATEL KANTILAL JIVARAJ

Appearance:

1. Criminal Appeal No. 1249 of 1986

MR KC SHAH APP for Petitioner No. 1

MR JM BUDDHBHATTI for Respondent No. 1

MR DN VORA for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 01/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.P.BUCH)

The State of Gujarat has preferred this acquittal appeal under Section 378 of the Code of Criminal Procedure, 1973 (for short, "the Code") in order to challenge the judgment and acquittal order dated 20/02/86 recorded by the learned Addl. Sessions Judge, Rajkot at Gondal in Sessions Case No.40/1985 under which the learned trial Judge acquitted the present respondent from offence punishable u/s.302 IPC by extending benefit of reasonable doubt to him.

2. The facts of the case of the prosecution before the trial Court may be briefly stated as follows;

2.1 The respondent was residing at Village Vadodar and as per the case of the prosecution, he had some relation with deceased Sharda. It is also the case of the prosecution that some efforts were made to see that the respondent should marry deceased Sharda. However, the parents of the deceased were not agreeable and ultimately, the respondent married elsewhere.

2.2 The prosecution has further alleged before the trial Court that on 24/06/85 at about 7.00 AM, deceased Sharda had gone out of her residence to ease herself. At that time, her cousin Nayna was accompanying her. At that point of time, the present respondent, all of a sudden came down to the spot and dealt several knife blows on the person of the deceased. On account of the said injuries, the deceased fell on the ground and ultimately succumbed to the injuries. Eye witness - Nayna went to report the episode to her mother. Her mother in turn sent Harsukh in order to call her husband, the complainant, who had just gone to the bus stand. The complainant came down to the residence. Learning about the above episode, all of them proceeded to the spot in question. Thereafter, the complainant lodged first information report. Investigation was undertaken. The respondent was apprehended, after being discharged from the hospital as he had reportedly consumed poisonous liquid. The dead body of the deceased was sent for postmortem examination. Panchnama about the scene of offence was drawn. Inquest panchnama was also drawn. Muddammal knife was seized. At the close of the investigation, chargesheet was filed against the present respondent. Since the offence punishable u/s.302 IPC was exclusively

triable by the Court of Sessions, the learned Magistrate committed the case against the respondent to the Court of Sessions. Copies of police papers were supplied. Charge was framed and it was read over and explained to the respondent. The respondent pleaded not guilty to the said charge and therefore, evidence was recorded.

2.3 The prosecution examined following witnesses before the trial Court;

PW-1, Maganlal Savjibhai - Complainant, Ex.5
PW-2, Labhubhen Vallabh, Ex.7
PW-3, Harsukh Mohan, Ex.8
PW-4, Ujiben Rambhai, Ex.9
PW-5, Mansukh Rambhai, Ex.10
PW-6, Kishor Premjibhai, Ex.11
PW-7, Himmatlal Popatlal, Ex.12
PW-8, Nayna Maganbhai - Eye witness, Ex.14
PW-9, Devayat Karna, Ex.21
PW-10, Ramnikbhai Devsibhai, Ex.24
PW-11, Majid Jikar Mulla, Ex.29
PW-12, Dr.J D Rabara, Ex.29
PW-13, Mrs.C V Geetha - Investigation Officer, Ex.40
PW-14, Mr.M R Chaudhary, Police Sub-Inspector, Ex.41

2.4 At the close of the evidence, the learned trial Judge recorded further statement of the respondent u/s.313 of the said Code. Thereafter, the learned trial Judge heard the arguments advanced by the learned APP incharge of the proseuction case and the learned advocate for the defence. After considering the evidences on record and after considering the arguments advanced before him, the learned trial Judge found that the prosecution had failed to prove the case against the respondent beyond reasonable doubt, and therefore, the learned trial Judge while extending the benefit of reasonable doubt to the respondent, acquitted the respondent from the offence punishable u/s.302 IPC.

3. Feeling aggrieved by the said judgment and acquittal order of the trial Court, the State of Gujarat has preferred this appeal before this Court. It has been mainly contended here that the trial Court has committed serious error in not properly appreciating the evidence of eye-witness Nayna; that in fact, Nayna was a natural

eye-witness and through a human error P.W. Harsukh, conveyed to the informant that Hansa was the eye-witness; that this was subsequently rectified and these aspects have not been properly appreciated by the trial Court as a whole; therefore, the judgment and acquittal order are illegal and erroneous and deserve to be set aside. The State has, therefore, contended that the present appeal be allowed, the judgment and acquittal order be set aside and the present respondent be convicted for the offence punishable u/s.302 IPC.

4. On receipt of the appeal, leave was granted. The Appeal was admitted. Bailable warrant was ordered to be issued in a sum of Rs.2,000/- against the respondent. Thereafter, the matter has come up for final hearing before us. Mr.K C Shah, learned APP has argued the matter at length on behalf of the State whereas Mr.J M Buddhbhatti learned advocate has supported the judgment on behalf of the respondent. It is not much in dispute that as per the case of the prosecution, the respondent wanted to marry the deceased and since, the parents of the deceased were not agreeable, the marriage could not take place and the respondent subsequently married elsewhere. There may not be any serious dispute about the same. On the date of the incident, as per the case of the prosecution, at about 7.00 AM, the deceased had gone to ease herself at a place where the women of the village used to go for easing themselves. P.W. Nayna had accompanied deceased Sharda. At that point of time, the respondent rushed to the spot all of a sudden and dealt several knife blows on the person of the deceased. The deceased succumbed to the injuries on the spot.

5. On this aspect of the case, the prosecution has examined informant - Maganlal Savjibhai, Ex.5. He has deposed that on the date of the incident at about 7.15 AM he had gone out to attend to his agricultural work; that when he reached the bus stand, his nephew Harsukh had come to him and had told him that the respondent had dealt knife blows on the deceased and Hansa was a witness to it. On receiving the information from his nephew, the informant returned to his residence and along with his wife and other members of the family, went to the spot, where the body of the deceased was lying. Sharda had already died at that point of time. Thereafter, the informant filed his F.I.R. stating that the above incident was conveyed to him by his nephew - Harsukh indicating that Hansa was an eye-witness.

6. On receipt of the F.I.R., P.S.I. Chaudhary went to the spot and started investigation. However, at that

point of time, it was learnt, as per the case of the prosecution, that it was not Hansa but Nayna who was the eye-witness. Therefore, the investigating Police Officer did not record the statement of Hansa, but, the statement of Nayna was recorded. Ultimately, Nayna was cited as an eye-witness before the trial Court. Hansa was not examined before the trial Court as a prosecution witness.

7. Now, so far informant - Mangalal is concerned, his evidence has been recorded at Ex.5. An attempt was made to argue that Harsukh had committed some error in informing this witness that Hansa was the eye-witness. It is true that an information was received by this witness from Harsukh and whatever information he had received was conveyed by him to the police which was reduced into writing and which is the F.I.R. before us. There is no dispute that the informant had given the name of Hansa as eye-witness in his F.I.R.. The F.I.R. also supports the said version of the informant. There cannot be any dispute about the same. The same is produced on record by the informant at Ex.6. Here, it has been argued that because of an error on the part of Harsukh, the name of Hansa instead of Nayana was conveyed to him. The point which is required to be considered is as to whether this could be treated to be a simple human error in conveying the name of Hansa instead of Nayna. Here, it is required to be considered that informant Mangalal had not gone to the Police Station soon after receiving the information from Harsukh directly from the bus stand itself. The informant had come back to his residence. He, along with his wife and other members of the family, had gone to the spot where the body of the deceased was lying. Therefore, there was an opportunity to the informant to collect the correct information from other members in the family. He had also an opportunity to meet Nayna and Hansa both. However, till the F.I.R. was lodged by him, it was not made clear that it was Nayna and not Hansa who had witnessed the incident. This creates doubt on the aforesaid version of the informant.

8. The defence has come out with a probable theory that Hansa was not mentally stable and therefore, the prosecution has substituted Nayna as eye-witness. A question was put to the I.O. and Ms.Chandrashekhar has also agreed, while giving evidence before the trial Court at Ex.40, that she had contacted Hansa, however, she was not mentally stable at that point of time and required some breathing time to mentally settle. Therefore, her statement was not recorded.

9. Now, if Hansa was not mentally stable at that

point of time, on account of the aforesaid episode and considering her age, then her statement could have been recorded a little late, in order ascertain as to whether she was an eye-witness to the incident or not. Neither Ms.Chandrashekhar nor Mr.Chaudhary recorded the statement of Hansa, in order to eliminate the possibility of her being an eye-witness to the incident. No explanation has been rendered by the prosecution for not recording the statement of this witness. It is nobody's case that she was mentally unstable for a pretty long time and till the investigation was over. The fact that her statement was not recorded and the fact that she has not been examined as a witness, again throws a doubt in the investigation as a whole.

10. Now, so far the other witnesses are concerned, we can refer to the evidence of Labhuben Vallabhbhai, Ex.31. She happens to be the mother of Nayna and wife of the informant. She has deposed before the trial Court that Nayna had accompanied the deceased when the deceased wanted to go to ease herself. That, thereafter, Nayna had come back and conveyed to her that the deceased was killed by the respondent and therefore, she had deputed Harsukh to call the informant. However, it is a matter of record that Harsukh did not convey the name of Nayna to the informant. The names of Hansa and Nayna are not identical. Harsukh, Nayna and Hansa are all brothers and sisters and they are residing in the same locality and in the same neighbouring premises. Therefore, Hansa and Nayna both were closely known and related to Harsukh. Therefore, it is not probable that Harsukh would commit an error in naming Hansa instead of Nayna. Therefore, it is doubtful, whether Nayna was really an eye-witness and not Hansa. This probability has not been ruled out by the prosecution.

11. If Harsukh had really committed an error, then it could have been rectified before the filing of the F.I.R.. The informant had come back, on learning the fact from Harsukh. He had contacted Labhuben, Harsukh, Nayna and Hansa. Therefore, if Nayna was the real eye-witness, then Harsukh had no reason to commit an error in naming Hansa. Moreover, even if did it, then the informant had all opportunities to get the correct information from other members in the family, before filing the F.I.R.. This has not been done, which again throws doubt in the conduct of the prosecution witnesses and in the prosecution theory itself.

12. Then, we can turn to the evidence of Harsukh Mohanbhai, Ex.8. He was the real brother of the

deceased. He has deposed that Labhuben had told him that as per the information received from Nayna, the deceased was killed by the respondent and therefore, he had gone to call the informant. He also states that instead of conveying the name of Nayna, he had conveyed the name of Hansa. Now, as said above, looking to the closeness of these persons, it is not probable that the witness would commit an error in naming Hansa in place of Nayna. Moreover, the informant had gone back and as stated hereinabove, there were opportunities to all of them to rectify the error before the filing of F.I.R.. This has not been done till the F.I.R. was filed which suggests that it may be an after thought to introduce the name of Nayna in place of Hansa. It may also be true that Hansa may not be fully mentally sound and therefore, instead of her name, the name of Nayna might have been substituted by the prosecution witnesses in order to avoid examination of Hansa as a prosecution witness.

13. Ujiben Rambhai is the mother of the deceased. She had no direct information as to how the episode had taken place.

14. Mansukh Rambhai, Ex.10 is a witness to whom muddammal Knife was handed over by the respondent and as per the case of the prosecution, the respondent had given the knife to this witness and the witness had given it to Kishore as the witness does not support the prosecution.

15. Same way, Kishore Premjibhai, Ex.11 has turned hostile. He has not deposed before the trial Court that muddammal knife was received by him from P.W. Mansukh Ex.10 and it was produced by him before police in presence of panch witnesses.

16. Himmatlal Popatlal, Ex.12 is a witness who had prepared the sketch of the scene of the offence. The said sketch has been produced by him at Ex.30.

17. Nayna, Ex.14 was examined as an eye-witness before the trial Court. She was 13 years of age and before administering oath to her, the trial Court had put certain questions to her, in order to ascertain as to whether she knew the sanctity of oath. Her evidence discloses that on 24/06/85, she had accompanied the deceased at about 7.00 AM, when the deceased wanted to go to ease herself. She had deposed that while she was standing at a distance of about 8 - 10 feet from the deceased, the respondent all of a sudden rushed to the spot, blocked her mouth and dealt many knife blows on the person of the deceased. That, she was frightened and

hence, ran towards her residence and conveyed the above fact to her mother. Thereafter, her statement was recorded by police.

18. The witness was cross-examined at length. It is required to be considered that at the initial stage she has stated to the police in her statement u/s.161 of the Code that the incident took place when she, in the company of the deceased, was on her way to the place where women of the village used to go for easing themselves. This would mean that according to the case of this witness, at investigation stage, the incident had taken place on the road and not at the place where the women used to go to ease themselves.

19. It is required to be considered that the witness has further deposed that she was not required to go to the place in question as she did not want to ease herself at that point of time. She also states in her evidence that a small tin containing water was held by her when the deceased was in the process of easing herself. Now, if the deceased had already taken her position to ease herself and if the witness did not want to ease herself, then, it would not be probable that the water tin would be held by her. Necessarily, it was for being used by the deceased and not by the witness. Therefore, the normal conduct would be that the deceased would have the water tin with her at least at the time when she had already taken her position for easing herself.

20. So, there is some change in the version of the witness, when she has deposed that the incident took place on the road and not at the place where the dead body of the deceased was lying. The above conduct of holding the water tin also creates doubt in the testimony of this witness.

21. Then, it is also not much in dispute that before the witness could reach her residence, there were houses of other persons and therefore, it was probable that other witnesses might have seen the incident or had reason to know the incident first. None of them has been examined by the prosecution.

22. An attempt was made by the defence before the trial Court that the deceased would have raised shouts on receiving injuries. The aforesaid fact was tried to be explained by the witness when she had deposed before the trial Court that the respondent had first blocked the mouth of the deceased and then knife blows were inflicted. There is a direct contradiction between her

oral evidence and police statement on this aspect of the case. It seems that she had not told the police in her police statement recorded u/s.161 of the Code, that the mouth of the deceased was blocked first and then knife blows were inflicted. Thereafter, even she is not able to say from which direction the respondent had come to the spot. There was open space around the place of offence. The witness was at a distance of hardly 10 feet from the deceased and yet she was unable to state as to from which direction the respondent had come to the spot. These aspects clearly go to show that Nayna may not be the eye-witness to the incident. Therefore, her version stands contradicted with her earlier statement before the police.

23. She has also deposed that after reaching her residence and after conveying the episode to her mother, she had gone to sleep. Now, this was not early morning. The incident took place at about 7.00 AM. The F.I.R. was filed thereafter and the police arrived at about 10.00 AM. This was not a time at which a girl of Nayna's age would go to sleep. This conduct on her part also suggests that she has been kept away from the I.O. for a long time.

24. Then, the prosecution has also examined PW-9 Devayat Karna, Ex.21. He is the panch witness and the inquest panchnama was drawn in his presence. The said inquest has been produced at Ex.22. There is no serious dispute about the same. Ex.23 is the panchnama of the scene of offence which is also not seriously disputed before us.

25. PW-10 Ramniklal Devasibhai, Ex.24 is also a panch witness. He has deposed before the trial Court that one Kishore had shown a knife which was seized by the police under Panchnama Ex.25.

26. Majid Jikarullah, Ex.27 is a witness to the panchnama under which the respondent was arrested on 26/06/85 at about 11.30 AM when he was discharged from the hospital.

27. Dr.J D Rabara, Ex.29 is the Medical Officer who had performed the post-mortem examination of the deceased. According to his evidence, the deceased had not less than 14 injuries and all of them were incise wounds. The deceased died on account of the said injuries and as per the post-mortem note produced by him at Ex.30 the cause of death was hemorrhage, shock and injuries to vital organs. In fact, the fact of death and

cause of death were not seriously disputed before the trial Court and also before this Court.

28. The next witness is Ms.Chandrashekhar who was serving as A.S.P. at Jetpur at the relevant point of time. Her evidence has been recorded at Ex.40. She has taken over the investigation from P.S.I. Mr.Chaudhary and had undertaken further investigation in the matter.

29. The last witness is P.S.I. Mr.Chaudhary, Ex.41. He started the investigation and subsequently, handed it over to A.S.P. Mrs.Chandrashekhar Geetha. Considering the above evidence, it is very clear that the prosecution has mainly relied upon the sole evidence of Nayna. She was posed as the solitary eye-witness. She was closely related to the deceased as well as the informant. Simply because the deceased was closely related to eye-witness Nayna, the evidence of eye-witness Nayna cannot be thrown away. At the same time, the above facts go to show that Nayna may not be an eye-witness to the episode in question. As said above, the informant had all opportunities to rectify the error before filing the F.I.R. which has not been done. The evidence of Nayna also suggests that she may not be an eye-witness to the incident in question. She has changed the place of incident. Her conduct at the place of offence is also not free from doubt. She is unable to state as to from which direction the respondent had come to the spot, though she was at a distance of not more than 10 feet from the deceased when the incident took place. She had not raised any shouts when she saw the respondent causing severe multiple injuries to the deceased. The water tin was found with her and not with the deceased. The trial Court has dealt with the evidence of Nayna at length and has given so many reasons for not accepting her testimony.

30. The trail Court has also considered the fact that the I.O. did not record the statement of Hansa in order to eliminate a probability of her being an eye-witness to the incident.

31. As said above, the case solely rests on the reliability and acceptability of the evidence of Nayna. Once it is found that the evidence of Nayna is not probable and acceptable or trustworthy, then there is no other evidence on record. The evidence of Nayna cannot be said to be satisfactory and therefore, the trial Court has not depended upon her evidence.

32. Considering the nature of evidence tendered by

Nayna and considering the reasons given by the trial Court for not accepting the evidence of Nayna, we are of the view that there is no reason to defer from the view expressed by the trial Court with respect to the non-acceptability of the evidence of P.W. Nayana.

33. In Ali Mollah and another V/s. State of West Bengal reported in AIR 1996 SC 3471, it has been observed that when there was the evidence of a solitary eye-witness and when the said eye-witness had not explained about his silence and when the statement made to the police was very much delayed, then in that event, it was not proper to depend upon the said evidence in order to convict an accused person.

34. We are of the view that the trial Court has given reasons for not accepting the evidence of Nayna as an eye-witness. We are, by an large, in agreement with the reasonings of the trial Court and therefore, when the appellate Court is in agreement with the reasonings and findings of the trial Court, it is not very much necessary to deal with the evidence in details. We agree with the reasonings and findings of the trial Court and find that the trial Court was justified in extending the benefit of reasonable doubt to the respondent. Therefore, there is no merit in the present appeal and it deserves to be dismissed.

35. Once it is found that the evidence of P.W. Nayana is not free from doubt and hence, not reliable, then, admittedly, there is no other evidence on record to connect the present respondent with the offence in question.

36. At the close of the arguments, it was brought to our notice that the respondent had consumed some poisonous liquid on the date of the incident at the village itself and therefore, he was admitted in the Hospital. F.I.R. was filed by the Police Officer against the respondent for an offence punishable u/s.309 IPC. Chargesheet was filed. The Magisterial Court found that both the offences had arisen from the same episode. Therefore, the said case was also committed to the Court of Sessions. It was registered as Sessions Case No.41/1985. It was also tried along with the present case against the respondent. Therefore, by an order, we had directed the office to call for the records and proceedings of the aforesaid sessions case. Fortunately, they have been received and we had an occasion to go into the same for our satisfaction. We find that the witnesses have turned hostile in the said case and the

respondent came to be acquitted from the offence punishable u/s.309 IPC. While placing the above fact before us, an attempt was made to argue that the respondent had subsequently repented on account of his act and therefore, he had consumed poisonous liquid. However, the said fact was not proved before the trial Court in Sessions Case No.41/1985. Therefore, we find that there is absolutely no scope for reversing the acquittal recorded in favour of the respondent by the trial Court.

37. With these observations, we dismiss the appeal of the State and confirm the judgment and acquittal order recorded by the trial Court. We may, incidentally direct the office that the records and proceedings of Sessions Case No.41/1985 which have been brought to us pursuant to our order referred to above, may be sent back without any loss of time, as these records and proceedings are no longer required by this Court. So far the disposal of muddammal article is concerned, the trial Court has passed appropriate order and we do not disturb the said order of the trial Court. The bail bonds of the respondent stand cancelled.

(D. K. Trivedi, J.)

(D. P. Buch, J.)

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